

AVOIDING PERSONAL SERVICES AND OTHER PROBLEMS ASSOCIATED WITH CONTRACTORS IN THE WORKPLACE

As we are all well aware, the emphasis upon downsizing the Government has led to an increase in the use of service contractors to support mission requirements. In this regard, it is of the utmost importance that Government personnel avoid violating the express prohibition against "personal services" contracts.

In order to avoid a personal services contract it is necessary to be able to recognize one. A personal services contract is a contract that, either by its express terms or as administered, makes contractor personnel appear to be Government employees. The Government is required to obtain its employees by direct hire under competitive appointment or other procedures established by the appropriate civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents these laws.

A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. Federal Acquisition Regulation (FAR) 37.104(c)(2) states that the key question in determining whether an employer-employee relationship is created between the Government and the contractor is: "Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?" Simply stated, although they may be working side-by-side, contractor employees cannot be supervised by Government personnel. An arms-length relationship must exist between the Government and its contractor employees. Additionally, contractor personnel cannot perform "inherently Governmental functions," that is, any functions which require the exercise of personal judgment and discretion on the part of a Government official. Work assignments and taskings to a contractor must be issued by the Government's point of contact, usually the Contracting Officer or the Contracting Officer's Representative, not by Government supervisors.

The FAR provides guidance to Contracting Officers with regard to avoiding personal services contracts. Foremost in that guidance is the requirement to obtain the review and opinion of legal counsel in doubtful cases. All employees, not only acquisition personnel, should seek advice from legal counsel when confronted with a situation they feel may be a violation of the prohibition against personal services.

Perhaps the contracted function that causes the most controversy is that of contractor employees performing clerical/administrative support services. Most often, the contractor performs these services on-site, using Government furnished facilities, equipment and supplies. As a result of the proximity of the parties and human nature, the arms-length relationship between Government personnel and the contractor is sometimes diminished to the point that contract performance is converted from non-personal to personal in nature. A contractor secretary, administrative clerk or key entry operator should not be given direction, receive assignments from or be supervised by Federal employees. The fact that the Government has limited resources is not a valid reason

for using contractor personnel to perform personal services or for Government officials to treat contractor personnel as Government employees.

The following are actual, real-life situations that have occurred at Fort Monmouth and/or within the Federal Government that have been determined to be violations of the prohibition against personal services. Please remember that the list is not intended to be all-inclusive, but rather merely representative of circumstances where a personal services relationship was created by the actions of the Government and contractor personnel.

- During a three-month period of time, the Government issued six hundred task orders to a support service contractor. This equates to one task order being issued every hour! Clearly, in this case, the Government was exercising continuous supervision and control over the contractor's employees. Hence a prohibited personal services relationship was created by the manner in which the Government administered the contract. Additionally, it is apparent that the Government misused the task ordering process established in the contract.
- A contract for what was purported to be stenographic reporting services was, in fact, a contract for secretarial work performed under Government supervision (in order to overcome a shortage of funds and personnel). The GAO determined that the contract as performed was for personal services and that the work should have been accomplished by Government personnel. Further, it was held that the Government could not make payment to the contractor for the unauthorized personal services performed under the contract. Accordingly, this situation also created the issue of whether the Government supervisor who ordered the work would be liable in his private capacity to pay the contractor for the (personal) services performed.
- A contractor secretary was required by a second-line Government supervisor to perform timekeeper duties for Government employees. This is a violation of the prohibition against personal services because the Government supervisor was exercising direction and control over the contractor's employee. Furthermore, the supervisor violated the Privacy Act by releasing protected personnel information to the contractor.
- At a Government test site, contractor personnel assisted in the testing of equipment. During a lull in the testing, the Government Test Director directed the contractor's employees to wash and wax the Government employees' POVs (figuring that the Government was paying for their time anyway). The Government supervisor created a personal services violation as well as contractual problems by directing the contractor to perform work outside the scope of the contract. His actions also created ethical and fiscal law problems because Government funds were improperly used to pay the contractor for cleaning privately owned vehicles.
- A PM requested a contractor to provide contract administration services, including issuing task orders and conducting negotiations on behalf of the Government. The contractor in this

situation was being directed to perform inherently Governmental functions, that is, functions that require the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Only Government employees can properly perform these functions, hence this work cannot be contracted out.

- A contractor was improperly directed by a PM to purchase ADP equipment for the Government. This equipment was intended for use by Government employees in the normal course of their work and was to be included as part of the organization's property inventory. This function is inherently Governmental in nature, cannot be contracted out and must be performed by Government employees. Furthermore, the PM's actions circumvented the FAR requirements regarding competition and the proper procedures applicable to the acquisition of ADP equipment.
- A PM appointed a contractor employee to act as his agent and take actions on behalf of the Government regarding business matters, including the commitment of funds. Again, this was a situation where the contractor was being directed to perform inherently Governmental functions which cannot be contracted out.

As a direct result of the increase in the use of support services contracts, many more contractor personnel are now integrated with and work among Federal personnel at Government work sites. In addition to the personal services issues discussed above, this situation causes potential ethical problems that we must recognize and strive to avoid. The overriding principle that must be remembered is that contractor employees are not Government employees and should not be treated as such. In this respect we must recognize that it is common for varying degrees of relationships to develop in the workplace, ranging from acquaintances, to good friends, to intimate relationships, to marriage. When such relationships develop between Government personnel and contractor employees, we must be careful to maintain proper ethical behavior in the workplace and avoid even the appearance of unethical or improper conduct.

The following examples are representative of improper situations that have occurred as a result of contractors in the workplace.

- Contractor personnel and their workspace were not clearly identified, hence Government employees did not know that they were not Federal employees.
- Contractor employees did not identify themselves as such when attending meetings or answering Government telephones. To prevent the improper disclosure of procurement sensitive or proprietary information, Government personnel should always request meeting participants to identify themselves at the beginning of the meeting and ensure that they know with whom they are speaking on the telephone or during VTCs.
- Contractor badges were not clearly distinguishable from Government badges.

- Contractors were allowed to bill the Government for time that the Commander administratively determined to be non-work hours (i.e., participating in Organizational Day festivities).
- A contractor was directed by the Government to plan and set up an organization's picnic and holiday party. The contractor then billed the Government both for the work done as well as for the period of time the contractor employees were in attendance at these functions. Under no circumstances should contractor personnel be directed to and/or be reimbursed for organizing such functions. Nevertheless, depending upon the circumstances, it may be appropriate for contractor employees to attend these types of functions. In these situations, it is imperative that the matter be discussed with the Contracting Officer and legal counsel to determine if contractor attendance is proper.
- Contractor employees were solicited for contributions to gifts for departing and retiring Army employees.
- Government personnel did not require contractor employees to sign non-disclosure statements (to protect procurement sensitive and proprietary information).

Remember, the situations outlined above are not all-inclusive. Government personnel, particularly supervisors and Contracting Officers' Representatives, must guard against the temptation to utilize contractor employees in a manner as if they were in the civil service and be vigilant in avoiding problems which can arise as a result of having contractors in the workplace. Everyone is responsible and accountable for ensuring, especially in the administration of support service contracts, that they exercise the utmost care to both avoid the violation of the prohibition against personal services and comply with all other applicable contractual, ethical, fiscal and legal requirements.

If you have any questions or require any additional information regarding this subject, the point of contact in the Legal Office is Patrick Terranova, DSN 992-3210.

KATHRYN T. H. SZYMANSKI
Chief Counsel